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No. 91-15

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1991

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RIESBECK FOOD MARKETS, INC., *et al.*,
*Petitioners,*

v.

UNITED FOOD AND COMMERCIAL WORKERS,
LOCAL 23, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia**

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## RESPONDENTS' MEMORANDUM IN OPPOSITION

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a state court has jurisdiction to enjoin picketing by a labor union which is arguably protected by the National Labor Relations Act where the union has sought to invoke the jurisdiction of the National Labor Relations Board to determine whether the picketing is protected, and where the picketing is not "obstructive, disruptive, or intimidating"?

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The question presented in this case is whether the National Labor Relations Act, as amended, ("NLRA" or "the Act"), preempts the state courts' jurisdiction to enjoin peaceful, non-disruptive picketing by a labor union where (a) the union contends the picketing is protected by NLRA § 7, 29 U.S.C. § 157, and (b) the union files an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board") seeking to establish the protected nature of the picketing.

Petitioners contend that this question "was unresolved by th[is] Court" in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180 (1978), that this supposed decisional void "has led to conflicting state court decisions" and that this supposed conflict "has left employers and labor unions with great uncertainty." Petition For a Writ of *Certiorari* ("Pet.") at 3. Not one of these assertions is correct.

1. In *Sears*, this Court considered the extent of the state courts' jurisdiction to enjoin picketing that is arguably protected by the NLRA in a case in which the union had *not* sought to invoke the NLRB's jurisdiction. The Court's reasons for holding that the state courts do have jurisdiction in that context leaves no doubt that federal law *is* paramount when the union *does seek to invoke the NLRB's jurisdiction.*

First, the *Sears* Court—after noting that the "primary jurisdiction" rationale of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and its progeny "militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board", 436 U.S. at 199 n.29 —reasoned that because the union there had *not* filed an unfair labor practice charge, there was "in fact no risk of overlapping jurisdiction," *id.* at 201. The Court explained:

> The primary-jurisdiction rationale justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else to induce his adversary to do so. In this case, Sears could not directly obtain a Board ruling on the question whether the Union's trespass was federally protected. . . . By demanding that the Union remove its pickets from the store's property, Sears in fact pursued a course of action which gave the Union the opportunity to file such a charge. But the Union's response to Sears' demand foreclosed the possibility of having the ac-

commodation of § 7 and property rights made by the Labor Board.

* * * *

*The primary-jurisdiction rationale unquestionably requires that where the same controversy may be presented to the state court or the NLRB, it must be presented to the Board.* But that rationale does not extend to cases in which an employer has no acceptable method of invoking, or inducing the Union to invoke, the jurisdiction of the Board. [436 U.S. at 201-02; emphasis added.]

Second, the *Sears* Court stated that "[w]hile there does exist some risk that state courts will on occasion enjoin a trespass that the Board would have protected, the significance of this risk is minimized by the fact that in the cases in which the argument in favor of protection is the strongest, *the union is likely to invoke the Board's jurisdiction and thereby avoid the state forum.*" 436 U.S. at 206 (emphasis added). The Court elaborated:

> If there is a strong argument that the trespass is protected in a particular case, a union can be expected to respond to an employer demand to depart by filing an unfair labor practice charge; *the protection question would then be decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers in the context of a labor dispute* . . . . [436 U.S. at 207; emphasis added.]

Precisely for this reason the Court stated its ultimate conclusion in *Sears* as follows:

> *As long as the union has a fair opportunity to present the protection issue to the Labor Board, it retains meaningful protection against the risk of error in a state tribunal.* In this case, the Union failed to invoke the jurisdiction of the Labor Board and Sears had no right to invoke that jurisdiction, and could not even precipitate its exercise without resort to self-help. Because the assertion of state jurisdiction in a case of this kind does not create a significant

> risk of prohibition of protected conduct, we are unwilling to presume that Congress intended the arguably protected character of the Union's conduct to deprive the California courts of jurisdiction to entertain Sears' trespass action. [436 U.S. at 207; emphasis added.]

*Sears* thus makes clear that in cases like the instant one—*in which the picketing union has invoked the NLRB's jurisdiction*—the state courts' jurisdiction to enjoin peaceful picketing *is* preempted. In such cases, unlike in *Sears*, there is a risk—indeed, a certainty—"of overlapping jurisdiction" as the very question presented to the state courts is also being presented to the NLRB. And, as *Sears* makes clear, "when the same controversy may be presented to the state court or the NLRB, *it must be presented to the Board.*" Indeed, in cases like the instant one, the very fact that the union has invoked the NLRB's jurisdiction—and that the General Counsel has issued a complaint on the union's behalf—indicates that "there is a strong argument that the trespass is protected." That being so, allowing the state-court action to proceed poses a real danger that "state courts will . . . enjoin a trespass that the Board would have protected."

In sum, the lesson of *Sears* is unmistakable: *where a picketing union invokes the NLRB's jurisdiction, "the protection question" is to be "decided by the agency experienced in accommodating the § 7 rights of unions and the property rights of employers."* 436 U.S. at 207.

2. In light of the foregoing, it is not at all surprising that—contrary to petitioners' assertion—the state courts are consistent in holding that *the jurisdiction to issue trespass injunctions is preempted once the NLRB's jurisdiction has been invoked.*

The court below cited three such decisions. *See* Pet. App. B-14. Our research has disclosed five others. *See People v. McKinney*, 514 N.Y.S. 2d 853 (N.Y. Crim. Ct. 1987); *Giant Food Stores v. UFCW Local 1357*, 120 LRRM 2025 (Pa. Ct. of Common Pleas, 1985); *affirmed*,

356 Pa. Super. 622, 512 A.2d 1293 (1986); *appeal denied per curiam*, 514 Pa. 631, 522 A.2d 559 (1987); *Brown Jug, Inc. v. Teamsters*, 688 P.2d 932 (Al. 1984) (dictum); *Retail Store Employees Local 655 v. Black*, 603 S.W.2d 676 (Mo. Ct. App. 1980).

So far as we can find, the sum total of cases on petitioners' side of the ledger is a single decision by an intermediate Maryland court. *See Weis Markets, Inc.* v. *Food and Commercial Workers Local 400*, 85 Md. App. 284, 583 A.2d 1092 (1991).[1] For three reasons, *Weis Markets* does not generate a sufficient conflict to warrant this Court's attention.

*First*, although the union in *Weis Markets* had, in fact, invoked the NLRB's jurisdiction, the Maryland intermediate court did not even discuss that fact in its two-paragraph analysis. *Second*, that court adopted a proposition that not even petitioners here seek to defend: *viz.* that *Sears* holds that there is no preemption in a case in which the union *does* invoke the NLRB's jurisdiction and that *Sears* is thus "dispositive of the preemption claim" in such cases. *Third*, *Weis Markets* was ultimately remanded to the trial court to decide whether, as a matter of state law, an injunction was appropriate. Thus, the *Weis Markets* ruling on the preemption issue is interlocutory which further diminishes its minimal precedential value.

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[1] The court below cited *Smitty's Super Markets v. Local 322*, 637 S.W. 2d 148 (Mo. Ct. App. 1982) as a "contra" holding. But in that case, the Missouri Court of Appeals upheld the lower court's jurisdiction because the union there did *not* file an unfair labor practice charge until "after the temporary injunction was issued." *Smitty's Super Markets* expressly states that the decision "followed" *Retail Store Employees v. Black, supra*, which squarely holds that state-court jurisdiction to issue such an injunction *is* preempted if an unfair labor practice charge *has been filed*. This case is like *Black* not like *Smitty's* because the Union's unfair labor practice charge was filed prior to the issuance of an injunction. Pet. App. B-4 to B-5.

Petitioners, in sum, grossly exaggerate in claiming that there are "conflicting state court decisions" as to whether the state courts have jurisdiction to issue a trespass injunction against peaceful labor picketing after the picketing union has filed a charge with the NLRB and that this asserted conflict has "left employers and labor unions with great uncertainty." Pet. 3. The reality is that there is but one aberrant intermediate court interlocutory decision, and that decision rests on a plain misreading of *Sears* and is otherwise unreasoned. Such a decision does not cast even a shadow of doubt on the correctness of the otherwise unbroken line of contrary rulings.

3. One final point needs to be made: *thirteen years* have now elapsed since *Sears* was decided and supposedly left "unresolved" the question posed here. Yet in those years there have been, so far as we have been able to determine, *less than ten reported cases* addressing this question, only half of which have reached the highest court of the state.

This is hardly a litigation record demonstrating the need for intervention by this Court. To the contrary, the paucity of decisions makes clear that the question posed here is of too little practical or doctrinal significance to warrant this Court's plenary review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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